Jurisdictional Statement

81-5640

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

THE STATE OF OHIO,
Appellee,

-vs-

JAMES SPIKES,
Appellant.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT OF APPELLANT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the due process of law clause of the Fifth Amendment to the Constitution of the United States preclude the admission of hospital records into evidence in a criminal case pursuant to statute and without testimony, when such records go to the proof of an essential element of the crime, even when notice of such intent has been given and the defendant is afforded the opportunity to call rebuttal witnesses, since such admission effectively shifts the burden of (dis-) proof to the defendant?

2. Does the confrontation clause of the Sixth Amendment to the Constitution of the United States, absent a showing of necessity, preclude the admission of hospital records into evidence in a criminal case pursuant to statute and without testimony, when such records go to the proof of an essential element of the crime, even when notice of such intent has been given and the defendant is afforded the opportunity to call rebuttal witnesses, since such admission effectively denies him the right to confront and cross-examine the witnesses against him?

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Supreme Court of the United States

October Term, 1981

No._____

THE STATE OF OHIO,

Appellee,

-vs-

JAMES SPIKES,

Appellant.

ON APPEAL FROM THE

SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

OF APPELLANT

OPINIONS BELOW

1. State of Ohio -vs- Spikes, Case No. 79CR428, Lake County, Journal Entry (sentence), copy appended.

2. State of Ohio -vs- Spikes, Case No. 8-018, Eleventh

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District Court of Appeals, State of Ohio, (unreported), Judgment and Opinion copies appended.

3. State of Ohio -vs- Spikes, Case No. 80-1552, The Supreme Court of the State of Ohio, 67 Ohio St. 2d 405, (1981), copies of Opinion, Judgment, and Mandate appended.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Supreme Court of the State of Ohio was rendered July 29, 1981. No motion for rehearing was filed.

Notice of Appeal was served upon Appellee by regular U.S. Mail on September 25, 1981, and thereafter filed in the Supreme Court of the State of Ohio on September 29, 1981. (Copy appended.)

This court has jurisdiction to review this matter on appeal pursuant to 28 U. S. C., Section 1257(2), in that the validity of Section 2317.422, Ohio Revised Code, has been drawn into question as it applies to criminal matters on the grounds that it is repugnant to the Fifth and Sixth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, Constitution of the United States

No person shall be held to answer for a capital, or

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otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section 2317.422, Ohio Revised Code

Method of Qualification of Hospital and Certain Other Records.

Notwithstanding sections 2317.40 and 2317.41 of the Revised Code, the records, copies or photographs thereof, of a hospital, and homes required to be licensed pursuant to section 3721.01 of the Revised Code, may, in lieu of the testimony in open court of their custodian, person who made them, or person under whose supervision they were made, be qualified as authentic evidence if any such person endorses thereon his verified certification identifying such records, giving the mode and time of their preparation, and stating that they were prepared in the usual course of the business of the institution. Such records, copies or photographs may not be qualified by certification as provided in this section unless the party intending to offer them delivers a copy of the same, or of the relevant portions thereof, to the attorney of

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record for each adverse party not less than five days before trial. Nothing in this section shall be construed to limit the right of any party to call the custodian, person who made such records, or person under whose supervision they were made, as a witness.

Section 2911.01, Ohio Revised Code

Aggravated Robbery.

(A) No person, in attempting or committing a theft offense as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in Section 2923.11 of the Revised Code on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

Section 2903.11, Ohio Revised Code

Felonious Assault.

1. Text of 2903.11, R.C., eff. 1-1-74.

2903.11. (A) No person shall knowingly:

(1) Cause serious physical harm to another;

(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of felonious assault, a felony of the second degree.

STATEMENT OF THE CASE

The facts material to consideration of the questions presented by this appeal are as follows:

The defendant-appellant, James Spikes, was arrested and

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indicted on charges of aggravated robbery, Sec. 2911.01 O.R.C., and felonious assault, Sec. 2903.11 O.R.C. No weapons or dangerous ordnance were involved, thus an essential element of each crime was that serious physical harm be inflicted or attempted.

In the course of discovery and approximately one month prior to trial, hospital records were provided by the State with affidavits complying to Section 2317.422 Ohio Revised Code attached. Upon being advised of the State's intent to introduce such records into evidence at trial pursuant to the statute, counsel for defendant timely filed a written Motion to Suppress said records, with Brief in Support, ruling being withheld by the Court. At trial, defendant objected when these records were offered by the State without testimony, but the records were admitted into evidence over objection and submitted to the jury. Defendant's objections have at all times been based upon Due Process of Law, Confrontation and Cross Examination, and Burden of Proof, since the evidence clearly went to an essential element of each crime. The defendant was found guilty of aggravated robbery and simple assault.

Defendant thereafter appealed to the Eleventh District Court of Appeals for Lake County, Ohio, raising again the issues presented to the trial court. The Court of Appeals reversed based upon both the confrontation and due process/burden of proof issues, finding the statute to be an infringement upon the constitutional rights of an accused.

The State of Ohio thereupon appealed to the Supreme Court of the State of Ohio which reversed the Court of Appeals insofar as these issues were concerned and ordered that sentence be carried into execution. The Court specifically stated in headnote 1 that Section 2317.422 Ohio Revised Code preserves the Sixth Amendment confrontation rights of a criminal defendant, and then at 1C (Opinion page 413) stated that rather than the burden of proof having been shifted by the statute, only the burden of

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going forward or producing evidence had shifted, referring to cases involving affirmative defenses.

It is from the judgment of the Supreme Court of the State of Ohio that James Spikes appeals, said statute and judgment being contrary to both the Fifth and Sixth Amendments to the Constitution of the United States.

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ARGUMENT

Although never specifically faced with the questions presented herein, prior decisions of this Court indicate that the defendant, through the application of Section 2317.422 Ohio Revised Code, has been denied his Fifth Amendment right of due process and his Sixth Amendment right of confrontation. The application of said statute in criminal cases being patently unconstitutional, although reasonable and proper in civil matters.

I. DUE PROCESS - BURDEN OF PROOF

The Supreme Court of Ohio at 1C (page 413) acknowledged that due process requires that the prosecution must prove each element of a crime beyond a reasonable doubt prior to a conviction citing IN RE WINSHIP (1970), 397 U.S. 358. The Court then proceeded to justify the admission of hospital records as an evidentiary procedure within the power of the State, citing Patterson v. New York (1977) 432 U.S. 197, 201-202 as standing for this proposition. Patterson, however, held in headnote 8 that the burden of proof as to every ingredient of a crime is on the State, and the burden cannot be shifted to the defendant by a presumption. This in effect is precisely what has been done in this case.

The statute and the State have given the defendant the right to and held that the defendant now has a duty to present evidence to contradict or overcome the contents of the records summarily admitted. The Court found this to be proper by referring to the distinction between the burden of persuasion and the burden of going forward with or producing evidence. In support of its position it cited STATE V. ROBINSON (1976), 47 Ohio St.2d 103, 106-107, which case involved the proof of an affirmative defense, not an element of the crime charged. The law is clear that the burden would have shifted to the defendant were we dealing with matters within his special knowledge as a defense, but such was not the case. The matter to be proved (or disproved) was an essential element of the crime charged, and as such the

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burden cannot be shifted to the defendant.

Defendant obviously has the right to present witnesses on his own behalf, as the last sentence of Sec. 2317.422 O.R.C. reaffirms, but he has no obligation to do so. To effectively shift the burden of proof/going forward/producing evidence to the defendant as to an essential element of a crime is reversible error. MULLANEY v.WILBUR, 421 U.S. 684, 44 L.Ed. 2d 508,95 S.Ct. 1881, headnote 5, which held, "The due process requirement that the prosecutor must prove beyond a reasonable doubt every fact necessary to constitute the crime charged . . ." is still good law, as evidenced by PATTERSON v. NEW YORK, supra, and SANDSTROM v. MONTANA, 61 L.Ed 2d 39.

In the present case the defendant had no duty to present any witnesses for any purpose. The attempt by the State of Ohio to impose such a duty through a rule of evidence, or by the courts to impose such by calling it a duty to go forward, were both erroneous. The proof as to serious physical harm, an essential element of each crime charged, was solely upon the State of Ohio. Although a state may regulate the procedure of its courts, it is limited by the fundamental principles of justice so as to preserve the rights of the accused, SNYDER v. MASS, 291 U.S.97,78 L.Ed 674 (1974), Headnote 1. The present case is an example of a state attempting to extend a reasonable civil rule of evidence to criminal matters, but overlooking its constitutional defects.

II. CONFRONTATION

The Supreme Court of Ohio has taken the position that Sec. 2317.422 Ohio Revised Code preserves appellant's confrontation rights, since defense counsel had an "opportunity" to bring the preparers of the medical records before the court through both deposition and compulsory process (P.413). The Court referred to OHIO v. ROBERTS (1980) 448 U.S. 56 as supporting the position that unavailability need not be demonstrated, but ignored the fact that ROBERTS (supra) involved the unavailability at trial

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of a witness who had testified at the preliminary hearing. It further found that cross-examination of the victim adequately scrutinized the reliability of his testimony and that testimony as to the records would have served no useful purpose. It essentially held that knowledge as to intended evidence and the right to compulsory process so as to contradict or impeach such evidence somehow overcome the accused right to be confronted with the witnesses against him. Such an attitude if extended to the limit evokes visions of trial upon depositions and/or ex parte affidavits, and summary proceedings for purposes of convenience.

The Court cited DUTTON v. EVANS, 400 U.S. 74 (1970) in support of the proposition that a showing of the unavailability of a witness was not necessary in order to admit the records, so long as they appeared to be reliable and of peripheral significance. In the present case, the records were the primary evidence, other than the testimony of the victim, as to the element of serious physical harm, and only the doctor could testify as to the seriousness of the injuries or the necessity of hospitalization. The defendant was never provided an opportunity to test the records in that no one ever testified in regard to them at any stage of the proceedings. The procedure employed was merely a short cut based upon the argument of reliability, while ignoring the right of confrontation. Although this right is not absolute, it is mandatory in the absence of a showing of sufficient cause, where the evidence, as in this case, goes to the proof of an essential element of each crime.

In the present case the witness was available and it is reasonable to believe that in the absence of this testimony by affidavit, defendant would not have been convicted. This evidence involved findings, opinions and hearsay upon hearsay in regard to both serious physical harm as well as the need for hospitalization, and was crucial to the case. Compounding the problem is the approach that once qualified, such records are admissible per se.

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Such is not the case, and even if submitted per statute, such records must be examined as to the admissibility of their contents, with the result that even in a civil case they may be excluded in part.

The courts of Ohio, in the interests of expediency and in the name of reliability, have denied the defendant his constitutional right of confrontation in respect to an essential element of proof. Such denial is repugnant to our entire system of justice and fair play.

III. CONCLUSION

Since the Ohio Supreme Court has thus decided a Federal question of substance in a way not in accordance with the applicable decisions of this court, having upheld a State statute which is contrary to the Constitution of the United States, such decision should be reversed herein.

Respectfully submitted,

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Statement of the Case

THE STATE OF OHIO, APPELLANT AND CROSS-APPELLEE, *v.* SPIKES, APPELLEE AND CROSS-APPELLANT.

[Cite as State v. Spikes (1981), 67 Ohio St. 2d 405.]

Criminal law—Evidence—Admissibility—R. C. 2317.422—Constitutionality—Discovery—Crim. R. 16—Prior criminal records.

1. R. C. 2317.422, which establishes a procedure for admitting hospital records in evidence, *via* a sworn, written certification from the custodian of records, preserves the confrontation rights of a criminal defendant. (Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, interpreted; R. C. 2317.422, applied; *State* v. *Tims*, 9 Ohio St. 2d 136, overruled, in part.)
2. Crim. R. 16 requires that, upon motion of the defendant, the court order the prosecutor to provide the defendant with a copy of the defendant's prior criminal record and with a copy of the record of any prior felony convictions of any prosecution witness. (Crim. R. 16[B][1][b] and [e], applied.)

(No. 80-1552—Decided July 29, 1981.)

APPEAL and CROSS-APPEAL from the Court of Appeals for Lake County.

On October 1, 1979, three males approached Fredrick Veshinfsky while he was at the Painesville recreation park. One of these males tapped on Veshinfsky's car. One approached him from behind and choked him until he lost consciousness. Veshinfsky testified that, after he regained consciousness, he found his wallet outside his pants and that $110 and his glasses were missing. He saw a white car going up a nearby hill. Veshinfsky noticed the male who had tapped on his car looking back at him from inside the white car. Veshinfsky pursued this car and pulled in front of it. Veshinfsky left his car, and appellee James Spikes left the white car. Veshinfsky testified that appellee then struck him several times in the nose and face.

After reporting the incident to the Lake County sheriff's

department, Veshinfsky went to Lake County Memorial Hospital. Several hours later, he was transferred to Richmond Heights General Hospital. Veshinfsky testified that he suffered a broken nose as well as having blood in his urine, trouble with his kidneys and back pains for two weeks.

Appellee was indicted on two counts: aggravated robbery, R. C. 2911.01, and felonious assault, R. C. 2903.11. Before trial, appellee moved the Court of Common Pleas to compel discovery of the felony and misdemeanor records of all witnesses for the purpose of impeachment at trial. The trial court ordered the prosecutor to furnish appellee with the felony and misdemeanor record of appellee and any felony records of the state's witnesses. The court observed that Crim. R. 16 does not require that the prosecutor supply a criminal defendant with the criminal record of his or her own witnesses.[1]

Appellee was tried to a jury. At trial, the prosecutor, over appellee's objections, cross-examined a defense witness regarding a misdemeanor conviction. Appellee later attempted to cross-examine Veshinfsky as to whether he had a misdemeanor record. The trial court sustained the prosecutor's objection. Defense counsel made an offer of proof on the record that he had received "information from a law enforcement official" that Veshinfsky did have a misdemeanor record. Defense counsel admitted, however, that he did not have an official report or court record substantiating his belief.

The trial court admitted in evidence, over defense objection, records from both of the hospitals at which Veshinfsky

---

[1] Crim. R. 16 provides, in pertinent part:

"(B) Disclosure of evidence by the prosecuting attorney.

"(1) Information subject to disclosure.

"***

"(b) Defendant's prior record. Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

"***

"(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney.***."

received treatment. Each hospital provided a sworn certification, as required by R. C. 2317.422.[2]

At the conclusion of the trial, the jury returned from deliberations and requested that the court read to them "the conditions needed for aggravated robbery." The court complied and repeated the definition of serious physical harm. The jury later found appellee guilty of aggravated robbery, R. C. 2911.01, under count one of the indictment. The jury also found appellee guilty of assault, R. C. 2903.13, a lesser-included offense under count two of the indictment, felonious assault, R. C. 2903.11. The trial court issued concurrent sentences of 4 to 25 years at the Ohio State Reformatory on count one and 60 days in the Lake County jail on count two. Appellee also received a fine of $500, which the trial court suspended. The Court of Appeals reversed and remanded the cause for further proceedings. That court held that *State* v. *Tims* (1967), 9 Ohio St. 2d 136, and appellee's constitutional right to confront the witnesses against him require that the examining physician testify prior to the admission in evidence of hospital records.

The cause is now before this court pursuant to the allowance of a motion and cross-motion for leave to appeal.

Mr. John E. Shoop, prosecuting attorney, and *Mr. Judson J. Hawkins,* for appellant and cross-appellee.

Messrs. Cort & Bruening and *Mr. Kenneth M. Cort,* for appellee and cross-appellant.

LOCHER, J. This cause presents two issues: (1) whether

[2] R. C. 2317.422 provides:

"Notwithstanding sections 2317.40 and 2317.41 of the Revised Code, the records, copies, or photographs thereof, of a hospital, and homes required to be licensed pursuant to section 3721.01 of the Revised Code, may, in lieu of the testimony in open court of their custodian, person who made them, or person under whose supervision they were made, be qualified as authentic evidence if any such person endorses thereon his verified certification identifying such records, giving the mode and time of their preparation, and stating that they were prepared in the usual course of the business of the institution. Such records, copies, or photographs may not be qualified by certification as provided in this section unless the party intending to offer them delivers a copy of the same, or of the relevant portions thereof, to the attorney of record for each adverse party not less than five days before trial. Nothing in this section shall be construed to limit the right of any party to call the custodian, person who made such records, or person under whose supervision they were made, as a witness."

the admission in evidence of hospital records under R. C. 2317.422 violated appellee's confrontation right;[3] and (2) whether due process of law and Crim. R. 16 require that the prosecutor provide defense counsel with the complete criminal records of all witnesses and of the defendant.

I.

R. C. 2317.422 permits the admission in evidence of hospital records which are properly certified. Neither the preparer nor the custodian is required to testify. R. C. 2945.41 provides: "The rules of evidence in civil causes, where applicable, govern in all criminal causes." This court has previously observed, however, that a criminal defendant's constitutional rights limit the applicability of civil rules of evidence to a criminal case. Cf. *State* v. *Tims* (1967), 9 Ohio St. 2d 136, 137. We continue to endorse this view.

Appellee argues that R. C. 2317.422 denies his right to confront the witnesses against him and shifts the burden of proof to him. Appellee's position is that the confrontation clause requires that the prosecution produce as witnesses at trial the people who prepared the hospital records, because the hospital records are hearsay. We disagree.

IA.

It is well settled that "[t]he Sixth Amendment's Confrontation Clause*** [is] made applicable to the States through the Fourteenth Amendment, *Pointer* v. *Texas,* 380 U. S. 400, 403-405, (1965); *Davis* v. *Alaska,* 415 U. S. 308, 315 (1974)***." *Ohio* v. *Roberts* (1980), 448 U. S. 56, 62, reversing *State* v. *Roberts* (1978), 55 Ohio St. 2d 191.

In *Ohio* v. *Roberts, supra,* the United States Supreme Court summarized the analysis for determining whether hearsay is admissible *vis-a-vis* the Confrontation Clause of the Sixth Amendment. Usually, the prosecution must produce the declarant or demonstrate why the declarant is unavailable to testify. "A demonstration of unavailability, however, is not

[3] At trial, defense counsel objected to the admission in evidence of the hospital records because they were not authenticated and because he could not cross-examine the people who prepared the documents. Although defense counsel did not mention confrontation, we recognize that lawyers often treat confrontation and cross-examination as being synonymous. This nuance should not prevent our review of the merits.

always required. In *Dutton* v. *Evans*, 400 U. S. 74 (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness.***" *Ohio* v. *Roberts, supra,* at page 65, fn. 7 (references omitted). Appropriate "*indicia* of reliability" must also be present. *Id.*, at 66.

There is no clear indication in the record in this cause whether the preparers of the hospital records were unavailable. Because the *Ohio* v. *Roberts* opinion states that unavailability is customarily necessary, we must consider what is constitutionally required when the prosecution does not establish that the witness is unavailable. *Ohio* v. *Roberts*, in fn. 7, quoted above, suggests that *Dutton* v. *Evans* (1970), 400 U. S. 74, provides the appropriate analytical framework.

In *Dutton*, defendant Evans and two others, Truett and Williams, were accused of murdering three police officers in Georgia. Evans elected a separate trial under Georgia law. Truett received immunity and testified for the prosecution against Evans. One of the 19 other witnesses who testified for the prosecution was a man named Shaw.

"He testified that he and Williams had been fellow prisoners in the federal penitentiary***[and] that when Williams was returned to the penitentiary from [his] arraignment ***Williams***[said], 'If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now.' " *Dutton, supra,* at 77.

The United States Supreme Court upheld Evans' conviction and noted, in a plurality opinion by Justice Stewart, that Shaw's "testimony, which was of peripheral significance at most, was admitted in evidence under a co-conspirator exception to the hearsay rule long established under state statutory law." *Dutton, supra,* at 87. The court also observed that it was inconceivable that cross-examination of Williams would reveal that Williams could not have known whether Evans was involved and that Williams made a misstatement under circumstances suggesting its reliability. The court concluded its opinion as follows:

"***[T]he possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal.

"Almost 40 years ago, in *Snyder* v. *Massachusetts*, 291 U. S. 97, Mr. Justice Cardozo wrote an opinion for this Court refusing to set aside a state criminal conviction because of the claimed denial of the right of confrontation. The closing words of that opinion are worth repeating here:

" 'There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law and set the guilty free.' 291 U. S., at 122." *Id.*, at pages 89-90.

In this case, Veshinfsky, the victim, testified regarding his injuries, his hospitalization and his treatment. Defense counsel cross-examined Veshinfsky during the state's case-in-chief as well as during appellee's case. In *Dutton*, Shaw testified only as to what he *heard* Williams *say*. Nevertheless, the court suggested that defense counsel's cross-examination of Shaw adequately scrutinized the reliability of his testimony. *Dutton, supra*, at 87, 89.

Veshinfsky, on the other hand, testified as to what he saw, what he did and what he felt. Testimony by the preparers of the hospital records would have added little or nothing. The possibility that their testimony would demonstrate that the records "might have been unreliable was wholly unreal." *Dutton, supra*, at 89.

Furthermore, defense counsel received the medical records approximately one month before trial. The record from each hospital contained a sworn certification from the custodian of records as required by R. C. 2317.422. Each certification states the time and mode of preparation and the traditional foundation for business records: (1) true and accurate copies and (2) prepared and maintained in the ordinary course of business.

This simplified method for qualifying these exhibits at trial expresses the intention of the General Assembly to expedite proceedings when the evidence demonstrates considerable trustworthiness as is the case with hospital records.[4]

[4] In 6 Wigmore on Evidence, (Chadbourn Rev.) 51, Section 1707, the author observed;

"A rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant.***If the hearsay exception involved in a given case is such as to commend itself to reasonable men, production of the declarant is likely to be difficult, unavailing, or pointless.***[T]he Sixth Amendment guarantees federal defendants the right of compulsory process to obtain the presence of witnesses, and in *Washington* v. *Texas*, 388 U. S. 14,***this Court held that the Fourteenth Amendment extends the same protection to state defendants." *Dutton, supra*, at 95-96 (Harlan, J., concurring).[5]

Prior to trial, defense counsel could have deposed the preparers of the reports. Crim. R. 15. Likewise, he could have subpoenaed those same people to testify at trial. Crim. R. 17. Indeed, R. C. 2317.422 expressly provides that the parties may call witnesses to testify about the records. See fn. 2, *supra*. Rather, defense counsel made a tactical decision to do neither. Counsel for the defendant, in *Dutton*, made much the same choice.[6]

The United States Constitution does not require that this court install a procedural safety valve which would permit criminal defendants to sit idly by at trial and during its preparation and which would decimate established and reliable exceptions to the rule against hearsay. Defense counsel did not pursue his options of discovery and compulsory process. Claims of constitutional violations do not disguise the fact that

"The medical records of patients at a hospital***should be admissible, either on identification of the original by the keeper or on offer of a certified or sworn copy. There is a necessity (Section 1421, *supra*); the calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a circumstantial guarantee of trustworthiness (Section 1422, *supra*); for the records are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone.***"

[5] The United States Supreme Court reaffirmed this position in *Ohio* v. *Roberts*, *supra* (448 U. S. 56), at 64.

[6] See 400 U S. at 88, fn. 19.

defense counsel's choice of tactics determined whether the potential witnesses would testify.[7]

IB.

Section 10, Article I of the Ohio Constitution is analogous to the Sixth Amendment and provides, in pertinent part: "In any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face * * *." The following passage summarizes this court's long-standing interpretation of this provision: "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Douglas* v. *Alabama* (1965), 380 U. S. 415, 418, quoted with approval in *State* v. *Madison* (1980), 64 Ohio St. 2d 322, 331; *State* v. *Swiger* (1966), 5 Ohio St. 2d 151, 163, certiorari denied 385 U. S. 874.[8]

Nevertheless, appellee argues that our holding in *State* v. *Tims, supra* (9 Ohio St. 2d 136), requires that we deem R. C. 2317.422 to be violative of his confrontation right.[9] Yet,

[7] Ineffective assistance of counsel is a separate claim. Appellee has not raised this issue, nor is it apparent from the record. Indeed, we have already commented upon the fact that counsel preserved the confrontation issue for appeal by his objection. See fn. 3, *supra*.

[8] This analysis parallels that of the minority in *State* v. *Roberts* (1978), 55 Ohio St. 2d 191, 199, reversed by *Ohio* v. *Roberts* (1980), 448 U. S. 56. Celebrezze, J., wrote, at page 200, in his dissent:

"As was stated in *United States* v. *Allen* (C.A. 10, 1969), 409 F. 2d 611, 613, '* * * the test is the opportunity for full and complete cross-examination rather than the use which is made of that opportunity. * * * The extent of cross-examination, whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right.' "

The United States Supreme Court acknowledged the viability of this approach in *Ohio* v. *Roberts*, at 70, in light of *California* v. *Green* (1970), 399 U. S. 149.

[9] The *Tims* court (9 Ohio St. 2d, at 139) relied upon *People* v. *Lewis* (1940), 294 Mich. 684, 293 N. W. 907. The Michigan Supreme Court overruled *Lewis*, however, in *People* v. *Kirtdoll* (1974), 391 Mich. 370, 217 N. W. 2d 37. Justice Williams wrote for the *Kirtdoll* court, at pages 389-390, as follows:

"To summarize, the business entry statute as enacted by the Legislature and interpreted in civil cases carefully secures the trustworthiness of the material admissible into evidence. As a consequence, there is reasonable assurance that only the truth will be presented in evidence and that the safeguard of cross-examination is not necessary to assure the truth.

defense counsel had an *opportunity* to bring the preparers of the medical records before the court through both deposition and compulsory process. He elected to do neither in spite of the fact that he received the records one month before trial. Neither the Sixth Amendment to the United States Constitution nor Section 10 of Article I of the Ohio Constitution exists in a vacuum, procedurally or substantively. Accordingly, we hold that R. C. 2317.422 preserves appellee's confrontation right under both the federal and state constitutions.

We also note that *State* v. *Tims, supra,* was decided before *Ohio* v. *Roberts, supra* (1980); *Dutton* v. *Evans, supra* (1970), and *State* v. *Madison, supra* (1980). Therefore, we expressly overrule *State* v. *Tims, supra,* to the extent that it is inconsistent with this opinion.

IC.

Appellee argues that admitting medical records under R. C. 2317.422 unconstitutionally shifts the burden of proof. We disagree.

Due process requires that the prosecution prove each element of a crime beyond a reasonable doubt prior to a conviction. See *In re Winship* (1970), 397 U. S. 358. R. C. 2901.05(A) embraces this standard and provides, in pertinent part:

"Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution.***"

A distinction exists, however, between the burden of persuasion and the burden of going forward with or producing evidence. This court has already recognized this distinction. See *State* v. *Robinson* (1976), 47 Ohio St. 2d 103, 106-107. The United States Supreme Court recently observed:

"***[I]t is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of

---

"In addition to trustworthiness the limitations to the right of confrontation have generally included the element of necessity. The necessity in the case of the business entry statute is the avoidance of breakdown in business operations by calling away a person or persons from critical work to verify records that may speak for themselves.***" (Footnotes and citation omitted.)

persuasion***.'" *Patterson* v. *New York* (1977), 432 U. S. 197, 201-202 (citations omitted).

At trial, the state presented the victim, Veshinfsky, and the medical records as evidence to meet its burden of persuasion as to the element of "serious physical harm."[10] R. C. 2317.422 merely provides an efficient means for introducing competent, reliable evidence. Defense counsel could have come forward with the preparers of the medical records but elected not to do so. As mentioned in Part IA, this unilateral, tactical decision does not create either a federal or a state constitutional violation.

II.

Appellee argues that the trial court erred by denying appellee's request for the misdemeanor conviction records of all prosecution witnesses and for the complete criminal records of all defense witnesses. We disagree.

Crim. R. 16(B)(1)(b) requires that the prosecution furnish the defendant with a copy of his prior criminal record. See fn. 1, *supra*. Crim. R. 16(B)(1)(e) requires that the prosecutor furnish the defendant with a copy of the prior *felony* records of prosecution witnesses. See fn. 1, *supra*. The court ordered accordingly, and the prosecutor complied. On its face, Crim. R. 16 requires no greater disclosure of the criminal records of witnesses than that which the trial court ordered.[11] "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore* v. *Illinois* (1972), 408

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[10] During the jury's deliberations, the jurors requested that the trial court explain serious physical harm, an element of both of the crimes alleged in the indictment. The trial judge repeated his earlier instruction: "Serious physical harm means any condition of such gravity as would normally require hospitalization, or which involves acute pain of such duration as to result in substantial suffering." The jury necessarily found "serious physical harm" only on count one. Mere "physical harm" is an element of assault, the lesser-included offense of which appellee was convicted on count two. Based on Veshinfsky's testimony, the jury could have found, beyond a reasonable doubt, that he experienced "acute pain of such duration as to result in substantial suffering." Therefore, any error which might have resulted from admitting the medical records in evidence would be harmless. See *State* v. *Moritz* (1980), 63 Ohio St. 2d 150, 156, 157.

[11] By comparison, Fed. R. Crim. P. 16 expressly requires disclosure of the defendant's record only.

U. S. 786, 795, rehearing denied in 409 U. S. 897. The *Moore* court, at pages 794-795, in light of *Brady* v. *Maryland* (1963), 373 U. S. 83, established the following criteria for reviewing the prosecution's denial of a defendant's request for the production of evidence before trial: "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."

Defense counsel's cross-examination of Veshinfsky regarding his prior misdemeanor record would not necessarily have been favorable to appellee's case. Furthermore, Veshinfsky had testified on direct examination that he had a prior felony conviction. Clearly, impeachment by means of a misdemeanor conviction would have been immaterial.[12]

Crim. R. 16 requires only limited disclosure of criminal records. Other pretrial discovery of criminal records is within the sound discretion of the trial court. See *State* v. *Edwards* (1976), 49 Ohio St. 2d 31, 42-43, *certiorari granted and death penalty vacated in* 438 U. S. 910, 911.

There is, therefore, no constitutional right to discovery in these circumstances. In *Cicenia* v. *Lagay* (1958), 357 U. S. 504, *overruled on different grounds in Miranda* v. *Arizona* (1966), 384 U. S. 436, 479 (warnings and waiver required *before* confession), the United States Supreme Court upheld a New Jersey court's denial of a defendant's request to inspect his confession before entering his plea on an indictment for murder. "[W]e cannot say that the discretionary refusal of the trial judge to permit inspection in this case offended the Fourteenth Amendment." 357 U. S., at 511 (reference omitted). The trial judge, in this case, construed Crim. R. 16 literally and applied it accordingly. There was, therefore, no abuse of discretion.

Accordingly, we reverse the Court of Appeals in part and hold that the hospital records are admissible under R. C. 2317.422. Otherwise, we affirm in part, and remand the cause to the Court of Appeals for instructions to the trial court to carry its sentence into execution.

---

[12] For the same reason, any error in denying defense counsel access to the victim's prior misdemeanor record was harmless and was not prejudicial.

Opinion, per LOCHER, J.

Judgment accordingly.

CELEBREZZE, C. J., W. BROWN, STRAUSBAUGH, SWEENEY, HOLMES and C. BROWN, JJ., concur.

STRAUSBAUGH, J., of the Tenth Appellate District, sitting for P. BROWN, J.

INSURANCE COMPANY OF NORTH AMERICA ET AL. *v.* AUTOMATIC SPRINKLER CORPORATION OF AMERICA, APPELLEE; THE ANSUL COMPANY, APPELLANT.

The word "include" in the second paragraph of the syllabus (page 91 of 67 Ohio St. 2d) should instead read "exclude."

SC-2 Barrett Brothers, Publishers, Springfield, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 81 *TERM*

To wit: July 29, 1981

The State of Ohio,
Appellant and
Cross-Appellee,

vs.

James Spikes,
Appellee and
Cross-Appellant.

No. 80-1552
/and CROSS-APPEAL
APPEAL FROM THE COURT OF APPEALS

for LAKE *County*

This cause, here on appeal /and cross-appeal *from the Court of Appeals for* LAKE *County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed* in part and reversed in part and cause remanded to the Court of Appeals,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the COURT OF APPEALS *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* LAKE *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

Clerk

Deputy

SC-9 BARNETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 81 TERM
To wit: July 29, 1981

The State of Ohio,
Appellant and
Cross-Appellee,

vs.

James Spikes,
Appellee and
Cross-Appellant.

No. 80-1552

MANDATE

To the Honorable COURT OF APPEALS

Within and for the County of LAKE, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed in part and reversed in part and cause remanded to the Court of Appeals for instructions to the trial court to carry its sentence into execution, for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN,
Clerk

..... *19*.....

.....

_____ Deputy

RECORD OF COSTS

Docket Fee . . . . . $ 20.00 *Paid by* John E. Shoop

Docket Fee . . . . . $ *Paid by* Affidavit of Indigency

Docket Fee . . . . . $ *Paid by*

Printing Record . . . . . $ *Paid by*

Supplemental Record . . $ *Paid by*

Sheriff's Costs . . . . . $ *Paid by*

FILED
COURT OF APPEALS
SEP 22 1980
ANDY J. TOTIN
CLERK OF COURT
LAKE COUNTY, OHIO

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT

COUNTY OF LAKE

COURT OF APPEALS CASE NO. 8-018

STATE OF OHIO,

Plaintiff-Appellee

- vs -

JAMES SPIKES,

Defendant-Appellant

JUDGES:

HON. ALFRED E. DAHLING, P.J.
HON. EDWIN T. HOFSTETTER, J.
HON. ROBERT E. COOK, J.

OPINION

APPEARANCES:

DATED: September 22, 1980

Attorney for Appellee:

John E. Shoop
Prosecuting Attorney
Lake County Courthouse
Painesville, OH 44077

Attorney for Appellant:

Kenneth M. Cort
1111 Mentor Avenue
Painesville, OH 44077

Appellant, James Spikes, has appealed a judgment of conviction and sentence for aggravated robbery and assault.

On October 1, 1979, Frederick Veshinfsky was assaulted and robbed of a sum of money by several black males in Recreation Park in Painesville, Ohio.

Appellant was later arrested, convicted, and sentenced as one of the black males who had assaulted and robbed Veshinfsky.

Appellant has appealed to this court and filed the following three assignments of error:

1. "The court's admission of medical records into evidence pursuant to R.C. 2317.422, without testimony in regard thereto and over the

defendant's objections, was prejudicial and contrary to law."

2. "The court's interpretation of Criminal Rule 16 (Discovery) was prejudicial and contrary to law, in that complete discovery was not required of the State, impeachment by proof of prior criminal records was improperly applied, and an oral statement was admitted although not disclosed in a timely manner."

3. "The court's failure to grant defendant's Motion to Dismiss and Motion for Judgment N.O.V. in regard to count one (Agg. Robbery, R.C. 2911.01) of the indictment was contrary to law, the evidence being insufficient to find the defendant guilty beyond a reasonable doubt."

Assignment of error one is well taken, but assignments of error two and three are without merit.

As to appellant's contention the trial court improperly admitted medical records of the victim, Fred Veshinfsky, he claims it was error because he was denied the opportunity to cross-examine the persons whose statements appeared therein and the admission of such records shifted the burden of proof to him by requiring him to call witnesses to controvert the hospital records.

Appellant's argument is well taken. Hospital records, which are properly authenticated, are generally admissible as evidence pursuant to R.C. 2317.40. However, State v. Tims (1967), 9 Ohio St. 2d 136, relied upon by appellant, held:

"The Business Records as Evidence Act, Section 2317.40, Revised Code, which allows the admission into evidence of records without

> substantiation by the person who actually performed the acts which resulted in such record, is not applicable to criminal proceedings so as to allow the admission into evidence under such act of hospital records showing the results of a physical examination of an alleged rape victim."

In the Tims case, the Supreme Court of Ohio recognized that R.C. 2317.40 (Business Records as Evidence Act) was a proper rule of civil evidence and that R.C. 2945.41 provides, "The rules of evidence in civil causes, where applicable, govern in all criminal causes."

However, the Court went on to point out at page 137, that R.C. 2945.40 provides that such rules govern only "where applicable" and "Such rules cannot govern if they infringe the constitutional rights of an accused."

The Court continued at pages 138-139:

> "One of the basic and fundamental rights guaranteed an accused by both the state and federal Constitutions is the confrontation of the witnesses against him. Section 10, Article I of the Ohio Constitution, provides that an accused has a right 'to meet the witnesses face to face.' As was said in Pointer v. State of Texas, 380 U.S. 400, at 405, 85 S.Ct. 1065, at 1068, 13 L.E. 2d 923:
>
> 'There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive

> an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.'
>
> This right of confrontation includes the right of cross-examination of the person who is the actual witness against him. If applicable in a criminal case, the Business Records as Evidence Act denies him such right. The act permits the introduction of evidence in the form of records without requiring the presence of the person who actually made the examination. It is this person who is the actual witness against the accused, not the custodian, and it is this witness that the accused has the right to cross-examine to determine his qualifications and to determine whether the tests were made properly.
>
> Here, the actual witness against the appellant was the examining physician whose findings were incorporated in the record offered as evidence.
>
> The effect of admitting hospital records in this type of case would be to allow the examining physician to testify without being subject to cross-examination."

In the instant cause, both the charges against appellant required the State to prove the appellant inflicted or attempted to inflict serious physical harm on the victim.

Therefore, as in the Tims case, the hospital records here were pertinent in that they contained statements of examining physicians whose findings were incorporated in the record as evidence of an element of each of the crimes charged against appellant.

To admit the subject hospital records, over objection, was

error prejudicial to appellant.

As to appellant's allegation of prejudicial misinterpretation of Crim.R.16 by the trial court, he argues the court erred in refusing to require the State, as part of Crim.R.16 discovery, to provide appellant prior misdemeanor records of all the witnesses of the State and appellant.

However, Crim.R.16(B) (1) (e), in pertinent part, states:

> "Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney . . . . "
> (Emphasis added)

We conclude the requirement of Crim.R.16(B) (1) (e), as to the duty of the prosecuting attorney to furnish a record of criminal convictions of witnesses he intends to call, does not extend to misdemeanor convictions nor to a defendant's witnesses.

As his last assignment of error, appellant claims the trial court erred in failing to grant appellant's motion to dismiss count one of the indictment (aggravated robbery) made prior to the jury being instructed and in failing to grant appellant's motion for judgment notwithstanding the verdict after the verdict had been returned.

In support of this assigned error, appellant contends the State offered no evidence as to the commission of a theft offense by appellant.

However, the testimony of Fred Veshinfsky, the victim, established beyond a reasonable doubt that appellant helped rob him of One Hundred and Fourteen Dollars ($114.00). He testified appellant was present at the time, was the only person to his left where someone came from and grabbed him from the rear, and that appellant and the man who grabbed him around the throat had no shirt on.

State v. Clay (1973), 290 Ohio App. 2d 206, held:

> "If evidence is sufficient to support an inference of guilt of an accused, and he fails to offer a reasonable explanation consistent with innocence, such failure may be considered by the trier of fact, and an inference arises therefrom that the truth is with the prosecution."

Judgment reversed and remanded for further proceedings according to law.

Robert E. Cook

ROBERT E. COOK, JUDGE

DAHLING, P.J.,

HOFSTETTER, J., CONCUR

FILED
COURT OF APPEALS
SEP22 1980
ANDY J. TOTIN
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,

Appellee

- vs -

JAMES SPIKES,

Appellant

JUDGMENT ENTRY

CASE NO. 8-018

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, which is incorporated hereby by reference.

No other error appearing in the record, judgment reversed and remanded for further proceedings according to law.

It is ordered that the costs shall be taxed against the appellee.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Robert E. Cook

JUDGE ROBERT E. COOK

FOR THE COURT

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

STATE OF OHIO	)	CASE NO. 79-CR-428
Plaintiff	)	
vs.	)	JOURNAL ENTRY
JAMES SPIKES	)	
Defendant	)	JUDGE PAUL H. MITROVICH

This day, to-wit: March 12, 1980, came the Lake County Prosecuting Attorney, John E. Shoop, by and through Judson J. Hawkins, Assistant Prosecuting Attorney on behalf of the State of Ohio, and the defendant, James Spikes, being in Court, and represented by counsel, Kenneth M. Cort, Esquire, the defendant having heretofore entered a plea of "Not Guilty" to the charges in the indictment, and further having been tried by a jury, the jury now returns its verdict and finds the defendant "Guilty" as charged of Count One of the Indictment, to-wit: Aggravated Robbery, a felony of the first degree, in violation of Section 2911.01 of the Ohio Revised Code; the jury also finds the defendant "Not Guilty" as charged of Count Two of the Indictment, to-wit: Felonious Assault, a felony of the second degree, in violation of Section 2903.11 of the Ohio Revised Code, but "Guilty" of the lesser included offense of Assault, a misdemeanor of the first degree, in violation of Section 2903.13 of the Ohio Revised Code.

The Court having given the defendant the opportunity to speak before judgment and sentence was pronounced against him;

IT IS THE ORDER OF THIS COURT that the defendant, James Spikes, be and hereby is sentenced to serve an indeterminate term of from Four (4) to Twenty-Five (25) Years on Count One at the Ohio State Reformatory in Mansfield, Ohio, and Sixty (60) Days in the Lake County Jail, in Painesville,

Ohio, sentences to be served concurrently, and the Clerk of Courts is hereby ordered to issue a warrant, directed to the Lake County Sheriff's Department, to convey the defendant to said institution. Defendant is further ordered to pay a fine of Five Hundred Dollars ($500.00) of which is hereby suspended. It is further ordered that the defendant pay the costs of this action, taxed at $_____, for which execution is hereby awarded.

This order is imposed under and by virtue of Sections 2911.01 and 2903.13 of the Ohio Revised Code.

Bond is hereby released.

IT IS SO ORDERED.

_____
PAUL H. MITROVICH, JUDGE

APPROVED:

JOHN E. SHOOP
PROSECUTING ATTORNEY

_____
JUDSON J. HAWKINS
ASSISTANT PROSECUTING ATTORNEY

JJH/es

CASE NO. 80 - 1552

IN THE SUPREME COURT OF OHIO

COLUMBUS, OHIO

STATE OF OHIO

Plaintiff-Appellant

-vs-

JAMES SPIKES

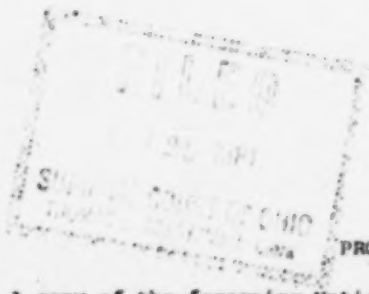
Defendant-CrossAppellant

NOTICE OF APPEAL

Now comes James Spikes, by and through his attorney, Kenneth M. Cort, and gives notice that the Defendant-Cross Appellant, James Spikes, will appeal the judgment of this Court rendered July 29,1981, to the Supreme Court of the United States, pursuant to 28 U.S.C., Section 1257 (2).

Respectfully Submitted,

KENNETH M. CORT
Attorney for James Spikes
1111 Mentor Avenue
Painesville, Ohio 44077
Phone: (216) 352-6141



PROOF OF SERVICE

A copy of the foregoing Notice of Appeal was sent by regular U.S.Mail, postage prepaid, to John E. Shoop, Prosecuting Attorney for Lake County, The State of Ohio, Lake County Courthouse, Painesville, Ohio 44077, this 25 day of September, 1981

KENNETH M. CORT
Attorney for James Spikes

CERTIFICATE OF SERVICE

Three copies of the preceding Appeal were served on John E. Shoop, Prosecuting Attorney for the State of Ohio, Appellee, by depositing same in a United States Post Office, postage prepaid, addressed to counsel at his offices at Lake County Courthouse, Painesville, Ohio 44077, this 23d day of October 1981.

KENNETH M. CORT
Attorney for Appellant

CORT & BRUENING
ATTORNEYS AT LAW
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PAINESVILLE, OHIO 44077